

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION

DIVISION III
No. CA08-90

CHARLES T. PRESLEY

APPELLANT

V.

BAXTER COUNTY REGIONAL, INC.,
d/b/a BAXTER REGIONAL MEDICAL
CENTER, INC. and ST. PAUL FIRE and
MARINE INSURANCE COMPANY
Insurer for BAXTER COUNTY
REGIONAL HOSPITAL, INC.

APPELLEE

Opinion Delivered SEPTEMBER 3, 2008

APPEAL FROM THE BAXTER
COUNTY CIRCUIT COURT,
[NO. CIV2002-43-1]

HONORABLE ROGER V. LOGAN,
JR., JUDGE

APPEAL DISMISSED WITHOUT
PREJUDICE

WENDELL GRIFFEN, Judge

In this medical-malpractice case, the Baxter County Circuit Court granted summary judgment in favor of Baxter County Regional Hospital, Inc. d/b/a Baxter Regional Medical Center (“the Hospital”) and its insurance carrier, St. Paul Fire and Marine Insurance Company (“St. Paul”), after finding that Charles Presley failed to sufficiently plead facts to establish St. Paul’s liability and that the Hospital was brought into the suit after the expiration of the statute of limitations. Presley appeals from that order, contending that the circuit court erred (1) in dismissing St. Paul from the suit when it admitted in its answer that it was the proper party in the suit; (2) in not allowing his amended complaint to relate back to the date of the original complaint; and (3) in not

certifying this case for interlocutory appeal. However, it appears that the circuit court has not dismissed a defendant from the suit. Accordingly, we must dismiss this case for lack of a final order.

Presley filed a medical-malpractice complaint on January 25, 2002, naming St. Paul, Dr. Michael Hagaman, and Kerr Medical Clinic as defendants. The Hospital was not named in the suit. Instead, Presley alleged:

That the Plaintiff received medical services during the month of February 2000, from the Baxter County Regional Hospital located in Mountain Home, Baxter County, Arkansas. That Baxter County Regional Hospital is not subject to suit in tort due to the fact that it is a cooperative, non-profit corporation, which has received 501(c)(3) designation from the Internal Revenue Service. That at the time of the events leading up to this Complaint at Law, the Baxter County Regional Hospital was insured by the separate defendant, St. Paul Fire and Marine Insurance Company. Pursuant to Arkansas Code Annotated Section 23-79-210, St. Paul Fire and Marine Insurance Company is directly liable for any negligent medical services performed at the Baxter County Regional Hospital and, therefore, St. Paul Fire and Marine Insurance Company is the correct party in interest.

St. Paul filed an answer on April 30, 2002, admitting that it was “the proper substitute defendant pursuant to Arkansas law based on the non-profit status of [the Hospital].” Dr. Hagaman also filed an answer, wherein he admitted that he practiced medicine in a group “which informally refers to itself as the Kerr Medical Clinic,” but he denied that the Clinic was a legal entity subject to suit. No answer was filed on behalf of the Clinic itself.

Soon after St. Paul filed its answer, the supreme court handed down its decision in *Clayborn v. Bankers Standard Insurance Co.*, 348 Ark. 557, 75 S.W.3d 174 (2002), where it analyzed the direct-action statute, Ark. Code Ann. § 23-79-210 (Repl. 2004),¹ and its

¹Subsection (a)(1) of the statute provides in pertinent part:

When liability insurance is carried by any cooperative nonprofit corporation, . . . or

applicability to nonprofit organizations. There, the appellant sued on behalf of her twenty-one-month-old daughter who was run over by a van driven by an employee of Forrester-Davis Development Center, Inc., a nonprofit corporation. The appellant filed suit against Forrester-Davis's insurance carrier pursuant to the direct-action statute. The circuit court dismissed the suit, and the supreme court affirmed, holding that the direct-action statute was not applicable because the appellant did not plead facts to suggest that Forrester-Davis was immune from suit. However, the court continued, and in *dicta* stated, that an organization that is immune from liability is not necessarily immune from suit.²

Relying on *Clayborn*, St. Paul filed a motion to dismiss on September 23, 2002. The circuit court agreed and found that pleading nonprofit status was insufficient to render the direct-action statute applicable. It stated that the complaint failed to state facts that would invoke the terms of the direct-action statute; therefore, it did not state a cause of action against St. Paul. However, it allowed Presley fifteen days to amend his complaint to name a cause of action against St. Paul.

On October 20, 2003, Presley filed an amended complaint, naming the Hospital as a

by any other organization or association of any kind or character and not subject to suit for tort, and if any person, firm, or corporation suffers injury or damage to person or property on account of the negligence or wrongful conduct of the organization, . . . , then the person, firm, or corporation so injured or damaged shall have a direct cause of action against the insurer with which the liability insurance is carried to the extent of the amounts provided for in the insurance policy as would ordinarily be paid under the terms of the policy.

²The supreme court relied on the *dicta* in *Scamardo v. Jagers*, 356 Ark. 236, 149 S.W.3d 311 (2004). However, it overruled *Scamardo* and the *Clayborn dicta* in *Low v. Insurance Co. of North America*, 364 Ark. 427, 220 S.W.3d 670 (2005).

defendant. It alleged:

That the Plaintiff received medical services during the month of February, 2000, from Baxter County Regional Hospital, Inc., located in Mountain Home, Baxter County, Arkansas. That the Baxter County Regional Hospital, Inc., is a domestic non-profit corporation organized and authorized under and by virtue of the laws of the State of Arkansas with [its] principal place of business in Mountain Home, Arkansas, engaged in providing medical services and may not be subject to tort suit for [its] negligence as hereinafter set out and if not subject to tort suit for [its] negligence as hereinafter set out then [its] liability insurance carrier, Saint Paul Fire and Marine Insurance Company, at the time of the acts complained of and set forth in this Complaint at Law, the separate Defendant, Saint Paul Fire and Marine Insurance Company, is a proper party Defendant. If in the alternative the separate Defendant, Baxter County Regional Hospital, Inc., d/b/a Baxter Regional Medical Center, Inc., is not immune from tort suit for its negligence then the separate Defendant, Baxter County Regional Hospital, Inc., d/b/a Baxter Regional Medical Center, Inc., alone is a proper party Defendant.

On October 27, 2003, the Hospital and St. Paul filed a motion to dismiss the amended complaint, contending that Presley failed to plead facts invoking the direct-action statute and that the complaint against the Hospital was barred by the two-year statute of limitations for medical-malpractice actions. The court agreed with the Hospital and St. Paul and, in an order filed June 14, 2004, dismissed them from the suit.³ Presley requested that the circuit court certify this case for interlocutory appeal under Arkansas Rule of Civil Procedure 54(b), but the court denied the motion. On July 26, 2007, Dr. Hagaman moved for summary judgment, and an order granting that motion was entered October 29, 2007. Presley subsequently filed a notice of appeal.

As previously stated, we dismiss this appeal for lack of a final order. Our jurisdiction over an appeal is an issue that we address *sua sponte*. *Hernandez v. Hernandez*, 371 Ark. 323, ___

³The June 14, 2004 order dismissed the lawsuit in its entirety, but upon motion by Presley it amended the order to reflect dismissal of the case against the Hospital and St. Paul only.

S.W.3d ____ (2007). Further, it is well settled that, with exceptions not pertinent here, we can only hear an appeal from a final order. *See* Ark. R. App. P.–Civ. 2(a). A final order is one that dismisses the parties, discharges them from the action, or concludes their rights to the subject matter in controversy. *E.g., McGann v. Pine Bluff Police Dep’t*, 334 Ark. 352, 974 S.W.2d 462 (1998).

The record here lacks a final order, as there is no order dismissing Kerr Medical Clinic from the suit. Presley alleged that Hagaman was associated with Kerr, but there is no pleading or motion filed on behalf of Kerr in the record. Hagaman answered the complaint as a separate defendant and moved for summary judgment as a separate defendant. The order granting Hagaman’s summary-judgment motion states, “There appears to be no proof sufficient to raise an issue for trial and *the motion for summary judgment in favor of the Defendant should be and is hereby granted and the case is dismissed*” (emphasis added). While it states that it is granting Hagaman’s summary-judgment motion and dismissing the case, this order does not clearly dismiss the Clinic from the action.

Without a final order, we lack jurisdiction to consider this appeal.

Dismissed without prejudice.

ROBBINS and VAUGHT, JJ., agree.